Department of Law Monthly Report

Department of Law
Office of the Attorney General
State of Alaska

June 2001
Issue Date –August 6, 2001

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In This Issue

Collections & Support

UNIT SETS RECORD ON FY 2001 COLLECTIONS

The Collections Unit closed out the 2001 fiscal year with record collections of $3,993,590. This exceeds the collections for the previous fiscal year by more than $1,000,000. In addition, in June 2001, the unit opened one civil collection and two OSHA collection files, closed three collection files, sent four demand letters to debtors, prepared one Satisfaction of Judgment, and filed three complaints to reduce OSHA penalties to judgment. On the criminal side, we prepared 45 letters to defendants, courts, and other agencies, requested 24 new refunds be issued, entered numerous judgments and adjustments to defendants' records in Oracle, and responded to telephone inquiries from courts and defendants. The Collections Unit has also begun the process for attaching the 2001 permanent fund dividends. The unit prepared and sent out 122 Writ of Execution packages to attach dividend checks of defendants who owe criminal judgments to the state. The unit is also continuing to work on drafting procedures and forms for the collection of restitution on behalf of victims.

CHILD SUPPORT DEBT SETTLED IN LICENSE CASE

AAG Connie Carson worked with CSED and the child support obligor, Mr. Lambert, to settle a child support debt prior to a court hearing on CSED's suspension of the obligor's driver's license. Mr. Lambert owed several thousand dollars in child support. AAG Connie Carson and CSED Licensing Supervisor Les James spoke with Mr. Lambert several times and were able to settle the arrearage. Therefore, CSED released Mr. Lambert's license prior to the hearing.

COURT APPROVES DRIVER'S LICENSE REVOCATION

After a contested hearing, AAG Mary Gilson obtained a favorable ruling on a child support obligor's petition for relief from CSED action to revoke her driver's license. Rita Fischer claimed that she was making her "best efforts" to pay child support and, therefore, that CSED was required to release her license under AS 25.27.246. Ms. Fischer owed several thousand dollars and had made no payments since September 2000. Testimony at the hearing established that she had been looking for work in Kaktovik, but there was no full time work available. However, Ms. Fischer had not applied for her Alaska Permanent Fund Dividend since 1997. We established at the hearing that she knew the dividend would be used to pay her child support and argued that, in light of the lack of regular employment in Kaktovik, her failure to apply for her PFD was evidence that she was not making her best efforts to pay her child support. The court agreed and ordered that CSED could proceed with the license revocation.

DEFAULTED POST SECONDARY LOAN PAID BY BORROWER

AAG Mary Ellen Beardsley represented the Alaska Commission on Postsecondary Education in a claim against a student loan borrower who received approximately $7,334 on three student loans between 1992 and 1993. He claims his ex-wife forged his signature and took the money without his knowledge. This issue was investigated by the Office of Special Prosecutions and Appeals, which determined that there was insufficient evidence to substantiate his claim. He has failed to make any payments on these loans and an action was filed to collect the defaulted loans. The borrower is now living in Illinois and was served with the complaint. Soon after service he contacted AAG Beardsley and requested a payoff. He has agreed to pay everything, including attorney's fees, and has sent a check to ACPE. Once that check clears the bank the case will be dismissed.

ARLF BORROWER SENTENCED FOR PERJURY

Former Agricultural Revolving Loan Fund borrower Edith Anne Butters was sentenced to 33 months in federal prison with three years probation for lying under oath to the bankruptcy court after defaulting on her ARLF loan, concealing ARLF assets, and filing bankruptcy. Ms. Butters reported that the collateral securing her ARLF loan had been stolen when in fact she had concealed it. AAG Elizabeth Hickerson initiated a coordinated effort by the ARLF loan officer, the State Troopers, Petersburg police, the United States Bankruptcy Trustee, and the Attorney General's Office that ultimately located the concealed assets and prompted revocation of Ms. Butters discharge in bankruptcy court and federal bankruptcy fraud charges being filed. This case is considered to be a major deterrent to future ARLF borrowers and those filing bankruptcy.

Commercial

THE ALASKA SUPREME COURT AFFIRMS ATTORNEY GENERAL'S AUTHORITY TO BRING SUIT TO PROTECT THE PUBLIC INTEREST

In 1998, the Attorney General sued a gaming operator, her husband, and their businesses in superior court for an order requiring them to disgorge money they received in violation of Alaska's charitable gaming laws. (*Botelho v. Griffin et. al.*, 3AN-98-9211 Civ.) The laws are designed to insure that charities receive a fair share of the proceeds of charitable gaming, such as pull-tabs and bingo. Many of the charitable organizations that would have received a portion of the damage award informed the superior court that they did not want the Attorney General to pursue the suit. In response, the superior court ordered the Attorney General not to pursue claims on behalf of the opting out charities. The Attorney General petitioned the Alaska Supreme Court to review and overturn the superior court order. The supreme court granted the petition for review and on June 26 reversed the superior court. The supreme court's decision permits the Attorney General to pursue all its claims in *Botelho v. Griffin.* Any money collected on claims for the charities that opted out of the suit will be placed into a public trust for distribution for other charitable purposes. AAG Dan Branch represents the State in the case.

NURSING BOARD ACCEPTS THREE PROPOSED DECISIONS

At its June meeting the Alaska Board of Nursing considered and accepted proposed decisions from an administrative hearing officer in three cases. In the first, the hearing officer recommended denial of licensure as a registered nurse to Linda K. David. The denial was based upon numerous false statements made by Ms. David on the license application, addressing other names she has used, her prior employment, past drug and alcohol abuse, and her fitness to practice nursing.

The board also accepted the hearing officer's recommendation to deny certification as a nurse aide in Alaska to applicant Alexandra Pearson. Ms. Pearson had been convicted of three misdemeanor theft offenses and two felonies: forgery, and failure to appear on the forgery charge. The board ruled that these convictions were "substantially related to the qualifications, functions, or duties of a certified nurse aide", and denied the certification application.

The third case, mentioned in the April monthly report, involved a certified nurse aide who had failed to report criminal convictions for which she had received suspended impositions of sentence. The hearing officer ruled that the applicant, Margaret Schwantes, should have reported the convictions, and recommended that the board impose a fine and a public reprimand. The board accepted the hearing officer's recommendation.

Consumer Protection

STATE SETTLES CLAIMS AGAINST EASY STREET AUTO

AAG Ed Sniffen negotiated an agreement with Easy Street Auto to settle several consumer complaints alleging that the auto dealer had failed to disclose prior accident and repair history on used vehicles, and also had failed to accurately disclose odometer readings. Although Easy Street denies it engaged in any wrongdoing, it has agreed to comply with Alaska's consumer protection laws for future transactions. Further, Easy Street will conduct a reasonable inspection of all its used vehicles prior to sale, and disclose any problems it discovers to prospective purchasers. Easy Street also paid restitution

to some consumers, and paid the state a $5,000 penalty.

THE COURT REMOVES GROCERY RESTRICTIONS ON TWO FORMER SAFEWAY STORES

On behalf of the state, AAG Ed Sniffen asked the Alaska superior court to remove certain restrictions on two former Safeway stores so that Associated Grocers, Inc., the current leasehold owners of the properties, could enter leases with Best Buy and other non-grocery entities. Under the original terms of a Consent Decree entered between the state and Safeway, seven former Safeway stores had to be sold to other grocery competitors before the state approved Safeway's purchase of Carrs. Six of those seven stores were sold to Associated Grocers and operated as Alaska Marketplace stores until December of last year, when the last of the six stores closed.

The Consent Decree prohibited Associated Grocers from selling or leasing these properties to non-grocery entities for a period of three years. After Associated Grocers tried for several months to find a grocery retailer for two of the properties, the state agreed to allow the Dimond Center and Northern Lights locations to be sold or leased to other entities. The court approved the state's request, and Associated Grocers is close to finalizing a deal with Best Buy, who plans to move into the Dimond location, and with the Alaska Club, who plans to move into the Norther Lights location. The state must still approve any request for grocery and non-grocery use of the remaining stores.

Fair Business Practices

ACCUSATIONS FILED AGAINST NURSE AIDE AND PHYSICIAN

AAG Robert Auth, on behalf of the Division of Occupational Licensing, prepared and filed an accusation against a Ninilchik certified nurse aide (CNA) who allegedly, over a five-year period, assaulted, abandoned, was intoxicated with, and had a sexual relationship with his female home health client, who is a quadriplegic. The CNA also allegedly failed to report three prior felony convictions in other states when he applied for a license in Alaska. AAG Auth also prepared and filed an accusation on behalf of the division against an Anchorage physician who is alleged to suffer from periodic episodes of depression that impairs his ability to practice medicine safely. He also has a history of benzodiazepine abuse that impairs his ability to practice safely.

INSURANCE ENFORCEMENT ACTION

AAG Signe Andersen advised and assisted the Division of Insurance in preparing an accusation against an U.S. branch of an alien insurer domiciled in England. The accusation is based on alleged violations of statutory requirements for increasing capital and surplus maintained by the U.S. branch when it is assuming reinsurance risks. The statutes require that the branch maintain an additional $20,000,000 in capital and surplus, unless it obtains a waiver from the director of the division of insurance to maintain less than that amount. While the accusation addresses past violations, AAG Andersen also assisted in preparing an order to address future conduct that would waive the $20,000,000 requirement subject to the branch meeting certain conditions.

SCOPE OF AUTHORITY OF JOINT INSURANCE ARRANGEMENTS

AAG Signe Andersen researched and advised the Division of Insurance regarding the authority of joint insurance arrangements to provide health insurance coverage to its members, when that coverage is part of a

liability insurance program. Under the insurance code (AS 21), municipalities, city and borough school districts, and regional educational attendance areas are allowed to enter into cooperative arrangements to pool contributions to either assume risk from losses to the participants on a group basis or purchase coverage for the participants on a group basis. The joint insurance arrangement, however, may only provide property or casualty insurance as defined under AS 21 and may not provide life, health, or title insurance, as such insurance. AAG Andersen concluded that a joint insurance arrangement may include certain health insurance benefits in its liability program because the definition of "casualty insurance" includes such benefits if issued as incidental coverage with or supplemental to liability insurance. To be incidental, however, the benefits must be provided under a coverage part in the liability policy or under an endorsement to the policy and the amount of benefits must not be substantial.

REGULATORY COMMISSION OF ALASKA

RCA Holds Hearing on Golden Heart Utilities' Rate Issues

AAG Steve DeVries represented the Public Advocacy Section (PAS) of the Regulatory Commission of Alaska (RCA) in a six day hearing before the commission. The issues addressed principally involved whether Golden Heart Utilities (GHU) should be allowed to include in its rate base plant facilities donated to GHU by the City of Fairbanks when Fairbanks sold off its utilities in 1997. GHU is the city's water and sewer utility. If GHU is successful, it will be able to earn a return on this donated plant in the form of higher rates to its ratepayers. The PAS, represented by AAG DeVries, and an intervenor, J&L Properties, argued that it would be poor public policy to allow a utility to include in rate base assets transferred to it at no cost, and then earn a return on those assets in its regulated rates. The net effect of a successful decision for the PAS will be lower utility rates for consumers.

RCA Before Ninth Circuit in 11th Amendment Immunity Case

AAG DeVries is also representing the RCA in a case before the Ninth Circuit Court of Appeals. The case originated in United States District Court when ACS filed a complaint alleging that the RCA had impermissibly implemented provisions of the Telecom Act of 1996 by incorrectly determining the amount of money GCI would have to pay ACS to compete with ACS in the Fairbanks and Juneau markets.

Under the Telecom Act, monopoly telecommunication providers are required to open their markets to competition. Under this Act, state utility commissions, like the RCA, are required to oversee this process, and when agreement cannot be reached, to arbitrate the disputes. Arbitrated decisions must be approved or rejected by state commissions, which decisions are subject to judicial review, according to the Act, only in federal court.

When ACS did not agree with the results of the arbitration, and the RCA's decision to adopt the arbitrator's decision, it filed suit in federal court naming GCI and the RCA. The RCA, through AAG DeVries, argued in a motion to dismiss that the RCA, as an agency of the state, is immune under the 11th Amendment. Judge Holland disagreed, and denied the motion. The RCA has appealed this decision to the Ninth Circuit. The RCA was successful in staying the entire action pending appeal. ACS has appealed this stay order decision to the Ninth Circuit as well.

The RCA's brief in the 11th Amendment immunity appeal has been filed with the Ninth

Circuit. ACS, in its appeal of the stay, has been ordered to show cause why its appeal should not be dismissed as untimely. Unlike 11th Amendment appeals that are automatically appealable under the collateral order doctrine, appeals of stays are not unless shown to meet certain circumstances. In essence, the effect of the stay must either fall within the collateral order doctrine's umbrella, or be found to have the effect of a denial of preliminary injunctive relief resulting in irreparable harm which can only be cured by immediate appeal (the "Carson" doctrine). Briefing on this issue has been completed. A decision is pending.

Governmental Affairs

RECONSIDERATION DENIED

United States District Court Judge H. Russel Holland denied a former Department of Corrections employee's request to reconsider a decision granting summary judgment in the department's favor. Carl Hanadel sued the Department of Corrections and his former supervisor in both state and federal courts, claiming that he was wrongfully discharged and suffered discrimination. The defendants won summary judgment in state court and then used that judgment to obtain summary judgment in federal court. Mr. Hanadel then unsuccessfully sought reconsideration of the federal court's decision. Mr. Hanadel has appealed the state court's decision to the Alaska Supreme Court. Argument in that appeal is likely to take place this fall. Mr. Hanadel has not indicated whether he intends to appeal the federal court's decision.

STATE FILES NINTH CIRCUIT APPEAL RELATING TO CAMPAIGN CONTRIBUTION CASE

The State of Alaska filed an appeal to the United States Court of Appeals for the Ninth Circuit on July 11, relating to Alaska's campaign finance law. United States District Judge James Singleton issued an order and judgment on April 10, 2001, that held unconstitutional Alaska's $5,000 limit on an individual's contribution to a political party, if the donation is made for a purpose other than nominating or electing a candidate. The court also held that an individual may contribute an unlimited amount of professional services to a political party, finding that Alaska's law limiting the donation of professional services to $5,000 was unconstitutional.

On June 11, 2001, Judge Singleton issued an amended order and judgment that held unconstitutional Alaska's law prohibiting corporations, labor unions, and certain other entities from contributing to a political party. The court stated that such contributions must be allowed as long as the donations are not used to nominate or elect candidates, thereby creating a "soft money" exception for contributions to political parties.

The State of Alaska is filing the appeal to seek review of the district court judgments. Alaska's position is that it is not required to allow "soft money" contributions to political parties. AAG Martin Schultz represents the Alaska Public Offices Commission in this case.

Human Services

LAWSUIT BROUGHT BY FAIRBANKS COMMUNITY MENTAL HEALTH CENTER RESOLVED

In December of 1998, Fairbanks Community Mental Health Center (FCMHC) sued the State of Alaska, Division of Mental Health and Developmental Disabilities, over the newly created management information system, Alaska Recipient Outcomes Research Application (ARORA). This management information system was created to allow grantee agencies to submit encrypted data to

the division for purposes of program oversight and review. FCMHC objected to this process and filed suit for declaratory and injunctive relief arguing, among other things, that submission of this information violated consumers' rights to privacy, required professionals to breach confidentiality, and created a conflict with the public records act. Despite the division's disagreement with FCMHC position, the division determined that further clarification of the requirements and protections for the information would be beneficial.

Bolstered by legislative audit reports chastising the division's inability to account of general funds provided to grantees, the department drafted SB 135, which clarified the purpose of gathering this information and provided clear statutory exemptions of this information for privacy and confidentiality purposes. SB 135 passed during the 2001 session so that, on July 17, 2001, AAG Stacie Kraly signed a stipulation to dismiss the FCMHC complaint based upon the new statutory authority and protections regarding consumer data provided to the division for program oversight. SB 135 was signed by Governor Knowles on July 20, 2001.

BOARD OF EDUCATION REVIEWS NEW LEGISLATION

The education attorneys attended a June meeting of management staff of the Department of Education and Early Development (DEED) and of the Board of Education in Seward. The attorneys assisted the department in reviewing recently passed legislation involving school funding, special education, teacher certification, and the high school graduation exam. The meetings resulted in a work plan for DEED that includes a rigorous public hearing schedule and a significant amount of regulation drafting as a result of the legislation.

In addition, AAG Jean Mischel has been actively defending childcare licensing decisions, which represents a new function at DEED. Substantial amendments to the childcare licensing and funding regulations have been proposed with the assistance of the DOL.

Legislation/Regulations

SPECIAL SESSION PASSES COMMERCIAL PASSENGER VESSEL ENVIRONMENTAL LEGISLATION

During June 2001, the Legislation and Regulations section provided legal assistance on legislation for the special session on commercial passenger vessel environmental compliance.

Due to the fine work of AAGs Craig Tillery and Steve Daugherty, a bill passed out of the special session and is now before the governor for his consideration.

The section also completed bill reviews on a variety of bills affecting the state budget for fiscal year 2002.

The section also edited and gave legal approval to regulation projects including fisheries regulations for Kuskokwim and Bristol Bay fisheries, fire and life safety codes for the Department of Public Safety, occupational licensing regulations to adjust fees, and procedures for electing student/advisory board members to the State Board of Education and Early Development.

Natural Resources

NORTH PACIFIC FISHERY MANAGEMENT MEETINGS

AAG Jon Goltz attended meetings of the federal North Pacific Fishery Managment Council in Kodiak from June 4th through June 7th. The council addressed protection measures for Steller sea lions under the Endangered Species Act, and the programmatic environmental impact statement for federal groundfish fisheries under the National Environmental Policy Act. Both issues could have broad economic and fishery management-related effects on the State of Alaska. AAG Goltz also attended meetings of the Alaska Steller Sea Lion Restoration Team on June 28th and 29th. Governor Knowles formed the team to develop a strategy for restoring healthy populations of Steller sea lions while allowing sustainable fisheries to continue.

COURT REJECTS STATE LIABILITY FOR TRESPASSING FISH

The owners of a mobile home park in Juneau sued the Alaska Department of Fish and Game in April 2000, after ADF&G denied their request for a Title 16, stream crossing permit. The permit was denied because their project to expand the mobile home park was found inconsistent with the Alaska Coastal Management Program. Plaintiffs alleged in their complaint, among other things, that the state had caused salmon to access their property, thereby subjecting them to regulation under AS 16.05.870, and preventing them from developing their property. Plaintiffs' theory was that the state action that allowed the fish to access their property, and the state's action in preventing them from excluding fish from their property was a trespass for which the state should be liable for damages in the form of lost profits. ADF&G argued that all landowners are subject to some form of regulation and being subjected to regulation is not a trespass. The court agreed finding that though there was state action that was a trespass (the state allegedly entered plaintiffs' property in 1984 for the purpose of maintaining fish passage) any liability for that action was barred by the statute of limitations and the continued presence of fish on plaintiffs property is not a trespass by the state, via the fish, but rather is the state exercising its valid police powers through regulation. The plaintiffs are apparently going to pursue an alternative claim for regulatory takings. This case is being handled by AAG Shannon O'Fallon.

MOTIONS PENDING BEFORE COURT IN TRUE NORTH MINING PROJECT

The Natural Resources section has opposed a motion to supplement the point on appeal in *Neighborhood Mine Watch v. DNR* (the appeal of the haul road right-of-way for the True North mining project North of Fairbanks). NMW now wants to appeal DNR's approval of a temporary amendment to the mine's plan of operations. A grant of the motion would require supplementation of the record with other DNR case files and post decisional documents. Therefore, this motion to supplement contradicts the court's denial of an earlier motion to supplement the record.

Oil, Gas, and Mining

June brought some personnel changes to this section. AAG Mike Barnhill transferred out of the Juneau Oil, Gas & Mining section and into the Juneau Commercial section. We were sorry to see him go, but pleased that he didn't leave the office altogether. He will continue to work on some of the oil and gas corporate income tax cases for this section. At the same time, the section welcomes Phil Reeves into

the fold. Phil has been with the AG's office for several years, representing the Department of Education and Early Development. Before that he worked for the North Slope Borough and for the Kenai Borough. We're very happy to have his experience and enthusiasm. Along with AAG Lisa Kirsch, Phil will advise the State Pipeline Coordinator's Office.

Special Litigation

TORT CASE ABOUT OVER-COLLECTION OF CHILD SUPPORT DISMISSED

An Anchorage attorney who filed suit against the Child Support Enforcement Division (CSED) for over-collection of child support has had all his tort claims dismissed by the superior court. The mother of the attorney's child had applied to CSED to have the state collect child support, but submitted a child support order that had been superseded. CSED began collection efforts at an incorrect rate, which was roughly $70 per month too high. The attorney/father did not pursue administrative remedies, but sued on a variety of tort and civil rights claims. AAG Richard Keck's motion for summary judgment was granted by the court, which found that the plaintiff could not pursue a civil rights claim, and that the state could not be sued in tort in this case because there was no viable cause of action and the state has immunity. The plaintiff's subsequent motion for reconsideration was denied.

Transportation

DOT & PF TO SHORE-UP SINKING HIGHWAY

This case involves the collapse of the Parks Highway near Ester. In 1999, miners excavated a large pit with a very steep high wall next to, and within the highway right-of-way. This significantly destabilized the highway, requiring DOT & PF to convert a portion of the highway to a gravel road. The landowner, miners, and insurers refused to correct the problem and would not grant the state appropriate access to correct the problem. AAG Gary Gantz filed an action for damages and sought emergency equitable relief to allow the construction of a buttress on the miners' land this construction season. Service was complicated by the fact that several defendants are located in foreign countries. Additionally, an insurance carrier filed a declaratory judgment action seeking to limit its liability under its policy. The Fairbanks superior court scheduled a hearing in June to consider the state's request for access to construct a buttress. The morning of the hearing, defendants agreed to allow access. Bids have now been opened and construction is expected to proceed.

DOT & PF ISSUES ADMINISTRATIVE DECISION ON PROTEST OF AIRPORT PARKING RFP

The Ted Stevens Anchorage International Airport issued an RFP for a parking concessionaire. A current holder of the parking contract protested the RFP, and appealed the airport's decision to proceed with the RFP. The appeal was lodged with the Commissioner of the Department of Administration. The airport argued the appeal should have been lodged with the Commissioner of the Department of Transportation and Public Facilities, and that the appeal should be denied. The Commissioner of Administration agreed the matter should be decided by the Commissioner of Transportation. The Commissioner of Transportation denied the appeal. AAGs Susan Urig and John Steiner represented the airport.

STATE V. NORTON, BRYANT APPEALED TO NINTH CIRCUIT AGAIN

We last reported on this case in April 2001. Following remand from a Ninth Circuit decision holding that the district court had jurisdiction to review an IBLA decision canceling state rights-of-way, Judge Holland held that the rights-of-way for a material source and a portion of the Parks Highway located within that material source must be excluded from an overlapping Native allotment. The state's grant for the material source pre-dated Bryant's use and occupancy of the same land, thus depriving Bryant of the ability to subsequently establish lawful use and occupancy.

This month, the federal defendants appealed Judge Holland's decision to the Ninth Circuit. One of the issues raised by the federal government is "whether [the] prior decision of the Court of Appeals on [the] issue of jurisdiction is binding in this appeal." The federal government is apparently arguing that the first Ninth Circuit decision is not binding in the present appeal because it was based on "an erroneous assumption regarding [the] position of the Agency" concerning an agency interpretation of law. This case is being handled by AAG John Athens.

CRIMINAL DIVISION

ANCHORAGE

Shawn Cloyd's trial for attempted murder and assault in the first and second degree ended in a hung jury. In September 2000, Cloyd and Eric Chaney were outside a Reggae club when Cloyd fired nine shots at Chaney. He was hit with four of those shots, two in the midsection, one in the buttocks and another in the forearm. Cloyd is claiming self-defense. A retrial is pending.

Three defendants were sentenced to five years in jail, flat time, for the beating of a 14-year-old boy.

A fourth defendant will be sentenced later this year. The four teenaged defendants beat and stomped the 14-year-old into a coma over the young boy's stolen bicycle. The victim spent two weeks in the hospital and has permanent brain damage.

Richard Wilkins had an argument with the victim and left the victim's residence. The victim felt he was too drunk to drive and tried to stop him. Wilkins tried to run over the victim, but the victim was able to jump out of the way. Wilkins then turned around and drove back toward the victim, who was standing at the side of the road. He veered across two lanes of traffic, striking the victim, and nearly hitting another person. A police officer came upon the scene and maneuvered his car to block Wilkins from hitting the victim again. The victim died. Wilkins had a breath alcohol content of 0.29 percent. A jury found him guilty of second-degree murder, felony leaving the scene, third-degree assault, and DWI. He received a composite sentence of 23 years with eight years suspended, ten years probation.

Franklin Singsahanath, age 20, and Gowly Xiong, age 16, were charged with murder in the second degree and manslaughter, respectively, for the beating death of an Anchorage woman. Xiong bashed the victim's head with a wooden platform shoe, breaking a plate in the victim's head. Sinshanath was the last to strike the victim, with an extremely hard punch to the head. Other juveniles participated in the beating and neighbors described them as a wolf pack. The victim was found outside her apartment and died on the way to the hospital.

Albert Bowman was sentenced to eight years in jail with one year suspended and five years probation for assault in the first degree.

Bowman's truck struck the victim's vehicle in a DWI collision last year. The damage to one of the victim's eyes has had the effect of aging 40 years, so now the 21-year-old has the eyes of a 61-year-old. Bowman received an additional year flat time for the DWI charge. The defendant had a rash of DWI convictions between 1975 and 1990.

Gilbert Edmonds was sentenced to a total of 37 years to serve for four counts of sexual assault in the first degree and one count of attempted sexual abuse of a minor in the first degree. Edmonds had sexually assaulted children and women for at least 14 years. He previously served a ten-year sentence for a 1987 conviction for sexual abuse of a minor.

Bret Maness was shot by police after a six-hour chase. Maness had been acquitted of shooting and killing a neighbor in 1997; however, he was out on bail pending appeal of a felony drug conviction arising out of the same case. When police arrived at Maness' home to serve a psychiatric commitment order, he fled. Maness was carrying an assault rifle and fired at police, when they closed in on him. As Maness turned toward an officer, a police sniper shot him in the chest. He is now charged with assault in the third degree, misconduct involving weapons in the third degree, coercion, failure to stop at the direction of a police officer, and reckless driving.

BARROW

A Barrow defendant was acquitted by a jury on charges of first-degree robbery and theft in the second degree. He was the accomplice of a juvenile who actually wielded a firearm during the episode. The trial judge told the defendant that he should appear at his upcoming probation revocation hearing with some pretty convincing arguments why he should not go to jail, since the evidence of his involvement in the robbery was clear to the court.

Two other Barrow defendants pleaded to charges of incest and will be sentenced in August. Another defendant pleaded to a charge of felony vehicle theft, his second.

BETHEL

Joseph Nicoli was found not guilty of sexual assault in the first and second degree after a jury trial. Jonathan Ayagarak was convicted of assault in the fourth degree (DV) after a jury trial. A third jury found Toby Jackson guilty of DWI.

Stanley Vaska was convicted, after a retrial, of sexual abuse of a minor in the first degree. He had been tried in 1996 for sexual abuse of a minor in the first and second degrees involving two victims. On appeal the court ordered the two cases severed. We proceeded to trial on the first-degree charge. After 16 hours of deliberation the jury returned a guilty verdict.

Indictments were handed down on charges ranging from sexual abuse in the first degree to burglary in the first degree and assault in the third degree.

CORRECTIONS

The state recovered $125 in fees and costs awarded in an inmate appeal from a prison disciplinary matter. The state executed on his Permanent Fund dividend, but the court advised that the funds had all been disbursed. A paralegal checked the file and asked a few questions, and the court personnel discovered that the funds were still in the registry. A check made payable to the state was soon forthcoming.

The Alaska Supreme Court rejected DOC's appeal of the application of the Cleary final order to the Central Arizona Detention Center. The state argued that the Arizona prison was

not subject to the terms of the final order in Cleary because the settlement agreement applied only to facilities owned or operated by the state. The court disagreed, ruling that the trial court's power to approve plans to cure overcrowding allowed it to require the Arizona facility to comply with the Cleary final order. *Smith v. Cleary*, Alaska Supreme Court Opinion No. 5426 (June 22, 2001).

After several evidentiary hearings, multiple pleadings, affidavits, and exhibits from both parties, Judge (and former DA) Trevor Stephens ruled in the state's favor in an effort by long-time prisoner and repeat felon Byron Charles to get out of jail early. The court shaved 22 days off DOC's computations of Charles' several sentences from the past 30 years, but denied him any other relief.

FAIRBANKS

Adam Williams was indicted for first-degree murder for stabbing his ex-wife 50 times with a knife after she went to his residence for a custody exchange of their child. In another domestic violence homicide, Oliver Lemon was indicted for second-degree murder for beating his girlfriend to death. Lottie Beasley was indicted with assault in the second degree and seven counts of assault in the third degree for beating children in her care with a steel rod. In another child abuse case, a father pled to multiple assault counts for using a shock collar on his 2-year-old child in order to prevent the child's crying. Aaron Smith was indicted for two counts of kidnapping and sexual assault in the first degree for the abduction and rape of a Native woman and a 15-year-old girl. John Shewfelt was indicted for arson in the first degree for setting fire to a house in Fort Yukon, which endangered the lives of children inside. Demetrius McGee was sentenced to 15 years by Superior Court Judge Pengilly on a manslaughter conviction arising out of a drug-related shootout. Samuel Carter was sentenced by Superior Court Judge Greene to 15 years on an assault in the first degree conviction arising out of a series of acts of domestic violence on his live-in girl friend.

JUNEAU

Richard Bean was indicted for selling marijuana from his home in Hoonah. Lenard Nelson was indicted for failure to appear in two separate cases.

Jimmie Jenkins was charged with one misdemeanor DV assault for spraying his girlfriend with bear spray and assault in the third degree under AS 11.41.220(a)(1)(C)(i) for using the same bear spray to spray her infant child, who required medical treatment. A police officer testified to his experience in being sprayed with the same type of chemical in training.

Kevin Wheaton was charged with two counts of sexual abuse of a minor in the second degree.

Trevor Shakespeare is an example of how a little knowledge can be dangerous. He was indicted in June for sexual abuse of a minor that occurred last January. He fled the state in February. In a tape-recorded conversation, he explained to the victim that nothing could happen to him because if he stayed out of state for the length of the statute of limitations he could not be charged. He then went on to explain that there was a rule of court that said the statute of limitations was 120 days. Shortly after his June 8 indictment, and about 130 days after the offense, he returned to Alaska. He seemed surprised when he was arrested.

KENAI

The Kenai grand jury was busy. It indicted a 19-year-old Peninsula resident, Robert Holt, for murder in the first degree and vehicle theft in the first. After the indictment of Holt for these crimes, his girlfriend, Sarah Lavey, was

indicted for interference with official proceedings for attempting to bribe a witness to say that someone else had committed the murder.
Likewise, the grand jury indicted another 19-year-old Peninsula resident, Rebecca Richel, for murder in the second degree and arson in the first degree, from a 1999 incident involving the death of her mother.

Certainly activity has picked up for this month based upon the number of felony DWIs and felony eludings.

KETCHIKAN

Chester Kocinski of Hyder (an isolated town on the Canadian border) was indicted for assault in the third degree and assault in the fourth degree. His teenaged daughter was driven home by a friend, and Kocinski got mad at the victim, who had driven the defendant's teenaged daughter home. The defendant hit the victim and stabbed him in the hand with a knife while the victim was still in the car. The victim and the daughter got out of the car and ran in separate directions. The Royal Canadian Mounted Police responded and took the victim to the hospital in the nearby Canadian town. Kocinski found his daughter and punched her in the stomach.

Reubon Borbon of Ketchikan was indicted for criminal mischief in the second degree and criminal trespass in the second degree. Hotel staff told him to leave the hotel and not come back, and the police escorted him out. Several hours later, Bourbon went to the hotel's maintenance room and tore out a pipe, causing water to flood the room and the bar below. He caused thousands of dollars in water damage to the hotel and the bar.

Two 14-year-old girls drank alcohol with five men. One of the men, Anton Demolee, took one of the girls into a room and forced her to have sexual intercourse with him. Later, he took another girl into a wooded area and sexual penetrated her. Demolee has been indicted for sexual assault in the first degree, two charges of sexual abuse of minor in the second degree, and furnishing alcohol to minor.

Another 14-year-old girl was home late at night when she answered a knock at the door. Timothy Stables tried to rape her, but she fought him off. He has been indicted for attempted sexual assault in the first degree and sexual abuse of minor in the second degree.

KODIAK

A Kodiak man was indicted for assault in the first degree following a vehicular accident in which his passenger received a gash on the head. The defendant's car slid over 200 feet and jumped a curve before colliding with two parked cars with enough force that one car was pushed into the wall of a building behind it, damaging the building. A subsequent blood test revealed that this defendant's blood alcohol level was 0.302 percent.

A Kodiak man, already on probation for felony driving while intoxicated, was again indicted for felony driving while intoxicated following a 4-wheeler accident in which he broke three ribs and his collarbone and punctured a lung. A blood test revealed a 0.213 percent blood/alcohol level four hours following the accident. This is the defendant's fourth DWI in the last five years and eighth DWI since 1981. The state will be seeking forfeiture of the 4-wheeler.

A Kodiak man was sentenced to 6 months in prison, with another two years suspended, and placed on probation for five years upon his conviction for assault in the second degree after breaking a pool stick over the head of another man. He was also ordered to pay restitution for the pool stick.

An Old Harbor man was sentenced to two years in prison, with another two years suspended, and placed on probation for six years, following his plea to sexual assault in the third degree. This defendant's adult niece was awakened as her uncle was holding her hands above her head while he was trying to pull down her pants. Fortunately, after she woke up the victim was able to repel the attack.

KOTZEBUE

Much of June was occupied with the trial of Steven Cleveland in a particularly brutal sexual assault case. The jury convicted on a homebrew manufacturing count, but unfortunately, hung on the sexual assault and felony assault counts. A retrial has been scheduled for September. Ros Lockwood has been busy attempting to clear up a substantial backlog of both felonies and misdemeanors in the office, trying to leave a manageable caseload for Windy East when she arrives in August. The sexual assault and kidnapping convictions of Ralph Hess were reversed by the Alaska Supreme Court; preparations are underway to retry the seven-year-old case in August.

NOME

Three men from St. Michael -- Leroy Kobuk, Lee Kobuk, and Milton Tom -- were indicted for the sexual assault of a woman in that village. Among other unpleasantries, they used a mop handle to sexually assault the victim. There were several other new sexual assault cases, as well. Lawrence Kulukhon waived indictment and pled guilty to sexually assaulting a 14-year-old girl in Gambell. John Ahkvaluk and Jimmy Fred Tocktoo were arrested on sexual assaults occurring, respectively, in Nome and Brevig Mission. Tyson Alowa's sexual assault arrest was delayed when, as he was running from the troopers outside of Savoonga, he fell off of a cliff, breaking his leg and hip.

Ben Milton was indicted for stealing two trucks; he stole the second one after the first one quit running. Denny Martin and Andrew Irrigoo were also indicted for vehicle theft involving the theft of a four-wheeler and then intentionally ditching it in the ocean.

PALMER

Mark Nason was convicted by a jury of misconduct involving weapons in the third degree. Nason has eight prior felony convictions. He was convicted in April of first-degree assault and wanted a separate trial on the weapons charge. These charges arose from an incident in 1999 where he shot his pregnant girlfriend with a 9mm handgun. Nason fired his retained attorney during the June trial. Another attorney was appointed, which caused a 13-day delay after the state presented its case.

Danny Wood was indicted on charges of kidnapping, attempted sexual assault in the first degree, coercion, attempted murder, burglary, assault, and violating a protective order. Wood entered the home of his estranged wife and beat her. She ran out of the house, but he caught her, dragged her back, and continued the assault by strangling her. Wood also transported her against her will to an area by the Knick bridge, where he assaulted her again by hitting her head against the car windshield. Wood was arrested in Missouri.

Gordon Samel was indicted on the charge of arson in the first degree. Samel, while high on cocaine, poured gasoline on a house and started a fire that caused over $50,000 worth of damage to the home. Samel has 30 prior convictions.

An indictment was also returned against Darren Adams on charges of attempted murder, burglary, and assault. Adams came to the victim's house and asked to use the

phone. He returned a short time later wielding a kitchen knife, pushed his way into the house, and lunged at the victim. After a struggle near the door, Adams dragged the woman further into the house, pinned her on the floor, and started choking her. Fortunately, a neighbor intervened and scared off the attacker. (The victim did not know Adams.) Adams has been previously convicted of sexual assault and robbery.

SITKA

There were several grand jury indictments, including a burglary/DV assault from Petersburg. Sitka indictments included sexual assault in the first degree, vehicle theft, a separate felony theft, and two counts of assault in the third degree (threats against police officers and their families). The misdemeanor caseload remained steady. The Sitka office was without any support staff throughout the month of June save for the extraordinary assistance of paralegal Roxane Rigo from Fairbanks for one week and Susan Price from the Juneau office for two days.

OSPA
Office of Special Prosecutions & Appeals

Prosecution News

Lakhdar convicted of nonsupport. Amal Lakhdar entered a plea of no contest to one consolidated count of criminal nonsupport. Lakhdar had fallen more than $67,000 into arrears on his obligation to support his three children. In accordance with a plea agreement, Lakhdar received a sentence of record whose terms included: 180 days of imprisonment, all of it suspended; a fine of $1,000, all suspended; and misdemeanor probation for five years. As a condition of probation, he is required to make monthly child support payments. The monthly payment will be $900 if he is self-employed and 55 percent of his disposable income if he is employed by another.

Two convicted of welfare fraud. In separate cases, Yvette Ash and Sharae Cofey entered pleas of no contest to charges of second-degree theft. Each had fraudulently obtained public assistance by failing to disclose that she resided with the biological father of one of her children. Cofey, who fraudulently obtained $7,503, will be required to spend four years on probation and perform 60 hours of community work service, in addition to paying full restitution. Ash, who fraudulently obtained $4,640.48, will be required to spend two years on probation and perform 40 hours of community work service, in addition to paying full restitution.

Herrman convicted by jury of game offense. Dallis Herrman was convicted by a Sand Point jury of two counts of illegally transporting big game hunters. His sentencing has been scheduled for September. Herrman charged $1,400 per hunter to transport the hunters to areas for bear hunting, but he did not have the necessary transporter's license.

Petitions & Briefs of Interest

Petitions of Interest

Grand jury – requirements for true bill. In a petition for hearing to the Alaska Supreme Court, the state challenges the court of appeals' decision in *Sanford v. State*,_P.3d, Op. No. 1748 (Alaska App., 6/8/01). In *Sanford*, the court of appeals held that a valid indictment may be returned only with the concurrence of a majority of those grand jurors who were present when the panel originally was sworn. The state argues that the law requires only the concurrence of a

majority of those grand jurors who heard the case. *State v. Sanford*, No. S-_____.

Briefs of Interest

Search and seizure – exigent circumstances. The state argues that the police were justified in entering the defendant's hotel room without a warrant after they discovered a person's body under the window of the hotel room. In particular, the state argues that the entry was justified by exigent circumstances, *i.e.*, the need to search for other possible victims of the violence that had led to the injuries on the known victim's body. *Mark v. State*, No. A-7661.

Search and seizure – plain view. The state argues that police officers were justified in seizing a suicide note they found in the defendant's boat while they were executing a warrant that authorized them to search the boat for the gun used in a recent attempted kidnapping. The state argues that the defendant had left the note on a table for other persons to find after his death, and so had relinquished any cognizable expectation of privacy in the note. Alternatively, the state argues that the seizure of the note was justified by the plain view doctrine. *Pearce v. State*, No. A-7445.

Search and seizure – eavesdropping. The state argues that what a police officer sees, smells, or hears from a lawful vantage point, without technological enhancement of his senses, is not protected by the right to privacy. In this case, a police officer who was lawfully positioned in an informant's living room overheard "with the naked ear" a drug transaction occurring in the arctic entry. Barrow Superior Court Judge Michael Jeffery held that the officer could not testify about what he had overheard. He also suppressed evidence derived from search warrants that were obtained in reliance on the officer's testimony. *State v. Boceski*, No. A-7894.

Violation of protective order – culpable mental state. The state argues that in a prosecution for violation of a domestic violence protective order the state is not required to prove that the defendant knew his conduct amounted to a violation of the order. The state contends that the only culpable mental states associated with the offense are (1) the defendant's knowledge of what he was doing, *e.g.*, that he is talking to the victim; and (2) the defendant's knowledge that he was subject to a protective order. *State v. Strane*, No. S-10033.

Court Decisions of Note - Alaska

Search and seizure – electronic surveillance. As a general rule, no search or seizure occurs when the police videotape conduct that could have been seen from a vantage point frequented by the public. In this case, the police installed a hidden video camera in the ceiling of a theater's box office, hoping to catch the box-office manager stealing from the till. The supreme court held that the manager's expectation that her activities would not be videotaped was not reasonable. In reaching this conclusion, the court relied principally on the fact that the interior of the box office was visible to members of the public through the ticket window and was regularly visited by other employees. The court also relied in part on the fact that the defendant had been entrusted with the handling of her employer's cash. The court said the result might have been different if the employer, when it arranged to record the manager, had lacked any reasonable basis for suspecting the manager of theft. *Cowles v. State*, Op. No. 5418 (Alaska Supreme Court, 6/8/01).

Failure to appear – extreme intoxication as defense. Under the version of AS 12.30.060 in effect prior to 2000, which required proof

that the defendant had "wilfully" failed to appear, extreme intoxication could constitute a valid defense to a charge of failure to appear. In reaching this conclusion, the court of appeals said that a defendant "wilfully" fails to appear when he "makes a deliberate decision to disobey a known obligation to appear in court." (Note, intoxication is *not* a defense under the current version of AS 12.30.060, which requires only proof of a "knowing" failure to appear.) *Hutchison v. State*, Op. No. 1747 (Alaska Court of Appeals, 6/8/01).

Grand jury – number of votes needed for true bill. The grand jury may return an indictment only with the concurrence of a majority of the grand jurors originally sworn and instructed. In reaching this conclusion, the court of appeals relied on Alaska Criminal Rule 6(n)(1). The state had argued that this rule is inconsistent with the constitution, which appears to require only the concurrence of a majority of the grand jurors who hear the particular case. The court of appeals rejected the state's argument. The court concluded that the constitution is "irresolvably ambiguous" on this point and that the supreme court, "acting in its role as administrative head of the court system, was authorized to promulgate a rule to clarify this point of grand jury procedure." *Sanford v. State*, Op.No. 1748 (Alaska Court of Appeals, 6/8/01).

Double jeopardy – successive federal and state prosecutions. A defendant's prior conviction in federal court for mail fraud did not foreclose her subsequent prosecution in state court for perjury and security violations, even though the perjury and securities violations had occurred as part of the defendant's efforts to cover up the mail fraud scheme. This ruling occurred in an appeal by the state. The trial judge had dismissed the prosecution after concluding that the state prosecution was barred under AS 12.20.010, which prohibits the state from prosecuting a "criminal act" that already has been prosecuted by another jurisdiction. The court of appeals held that neither this statute nor the state's double jeopardy clause barred Bonham's state prosecution. *State v. Bonham*, Op. No. 1749 (Alaska Court of Appeals, 6/22/01).

Appellate practice – procedure for disposing of frivolous appeals. When an attorney who has been appointed to represent an indigent defendant on direct appeal concludes that there is no colorable basis for challenging the defendant's conviction, the attorney must submit to the court of appeals (along with a motion to withdraw) a brief that contains "a full explanation of all the claims the attorney has considered and why the attorney has concluded that these claims are frivolous." *Johnson v. State*, Op. No. 1750 (Alaska Court of Appeals, 6/22/01).

Sex offender registration – application to persons discharged before statutes' effective date. A person convicted of a single sex offense who was unconditionally discharged after July 1, 1984 but before August 10, 1994 (the effective date of the sex offender registration act) and who was physically present in Alaska on the act's effective date is required to register (and is subject to prosecution for failing to register) in spite of an anomaly in the registration statutes. The anomaly is this: the statute that determines that date by which offenders are required to register, AS 12.63.010, contains no explicit provision for offenders who had been discharged from prison and probation prior to the act's effective date and were present in Alaska on the act's effective date. *Nunley v. State*, Op. No. 1751 (Alaska Court of Appeals, 6/29/01).